



ABETZ CURTIS
LAWYERS

DISCUSSION PAPER

PLANNING
ENFORCEMENT
UNDER NEW LUPA
ACT PROVISIONS

83 Davey Street
Hobart Tasmania Australia 7000
GPO Box 405
Hobart Tasmania Australia 7001

Phone 03 6223 8955
Facsimile 03 6234 9640
Email info@abetzcurtis.com.au
Web www.abetzcurtis.com.au



1. INTRODUCTION

- 1.1. Recently a series of amendments to the *Land Use Planning and Approvals Act 1993* (Tas) ('LUPA') have ushered in a more stream-lined approach to planning enforcement. Under the new provisions Councils are required to take a 'front and centre' position in enforcing their planning schemes.
- 1.2. Persons are now required to report suspected contraventions of section 63 of LUPA to the Council before they have access to the Resource Management and Planning Appeal Tribunal ('Tribunal') and enforcement under section 64.
- 1.3. A Council may no longer make an application under section 64 of LUPA but rather is provided with alternative powers for direct enforcement. A Council may decide to take action of its own motion or in response to a complaint from a member of the public.

2. WHAT ARE COUNCIL'S ENFORCEMENT POWERS?

- 2.1. It remains one option for Council to prosecute the alleged offender by filing a complaint in the Magistrates court.
- 2.2. Alternatively Council may issue an infringement notice or commence the enforcement process.

Infringement Notice
- 2.3. The Land Use Planning and Approvals Regulations 2014 ('Regulations') prescribe the offences for which a Council may issue an infringement notice under section 65A of LUPA. There are currently six (6) such offences, two of which relate to the removal or obscuring of signs advertising applications, and three relate to misrepresentations about electronic planning instruments. The other relates to offences under section 63 of LUPA.
- 2.4. An infringement notice may be challenged in the usual way by the recipient requesting that the charge be determined by a Magistrate. Infringement notice penalties may include fines of no more than 20% of the maximum penalty a court can impose on conviction for the offence.
- 2.5. If the recipient pays (in whole or part) the infringement penalty or fails to request a Magistrate's determination of the issue, he or she will be deemed to be guilty.



- 2.6. If an infringement notice is served on a person other than the owner of the land, the owner must be notified.

Enforcement Notice

- 2.7. A Council may issue a notice of intention to issue an enforcement notice under section 65B of LUPA upon reasonable belief that a person has offended, is offending, or is about to offend, against sections 57(4A), 63 or 64(7) of LUPA. The recipient is entitled to make a representation in relation to this notice which Council must consider.
- 2.8. Council may choose to proceed with an enforcement notice under section 65C having had regard to the representation. Where circumstances dictate urgency, the requirement of an intention notice may be foregone.
- 2.9. An enforcement notice may be issued no sooner than 14 business days after the intention notice and can require a wide range of remedial conduct from an owner or occupier of land. This is outlined in section 65D of LUPA.
- 2.10. A person who receives an enforcement notice may appeal the notice to the Tribunal. Under section 61(7) a person wishing to appeal an enforcement notice must lodge their appeal within 14 days.
- 2.11. It is an offence for a person to fail to comply with an enforcement notice unless the person has lodged an appeal. Conviction under section 65E(1) for failure to comply attracts a heavy fine.
- 2.12. Both prosecution proceedings before a Magistrate and appeal proceedings before the Tribunal may result in orders requiring a person to carry out work or authorising Council to do so at the person's cost.

Cancellation of a Permit

- 2.13. Sections 65F and 65G of LUPA enable a Council to cancel a permit where an enforcement notice has not been complied with, or where the permit would not have been issued but for a material misstatement of fact by the applicant. The relevant notice and representation provisions apply, as does the permit holder's appeal right under s 61(8). Again an appeal must be lodged with 14 days of service of the notice.
- 2.14. If an enforcement notice or cancellation of permit notice is served on a person other than the owner of the land, the owner must be notified.

How does a Council verify the contravention?

- 2.15. Part 4 Division 4B of LUPA gives Council officers (and police officers) powers to enter, search and seize property relevant to a suspected breach, either with the owner's consent or subject to a search warrant if necessary, sought and executed under section 65K.



3. WHAT IS THE ROLE OF A PERSON WHO MAKES A COMPLAINT TO COUNCIL?

- 3.1. Anyone with a proper interest in the subject matter of a contravention may file an application with the Tribunal to compel a user or developer of land to show cause why they should not be ordered under section 64 of LUPA to comply with planning requirements.
- 3.2. Under the recent changes, a person must still have a proper interest in the subject matter of the contravention but an application under section 64 is now confined to persons other than the Planning Commission or a Council and only after a complaint has been made to Council and Council has failed to take action.
- 3.3. A complainant is required to formally notify Council of the alleged contravention. The Council then has 120 days to investigate and decide whether or not to take action. If the Council decides to take action, the complainant is barred from taking enforcement proceedings in their own right.
- 3.4. If the Council decides not to take action the complainant may then file their section 64 application, the Council will normally be joined as an applicant.
- 3.5. The requirement of notice to Council under section 63B(1) does not apply if the contravener is the Council itself.

4. CONCLUSION

The upshot of these changes is that the primary responsibility for planning enforcement rightly rests with Councils. People are denied the ability to commence proceedings against a neighbour unless the Council has first considered their complaint and had the opportunity to take its own prosecution, infringement or enforcement action.

Council now has a range of powers for dealing with a contravention without recourse to the Tribunal but those accused of a contravention retain their rights to have the issues decided by the Tribunal on appeal.

For further information in relation to the issues discussed in this paper, please contact either John Kirkwood or Roger Curtis.

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